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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of the)
Telecommunications Act of 1996)

Telecommunications Carriers' Use)
of Customer Proprietary Network)
Information and Other Customer)
Information)

CC Docket No. 96-115

REPLY COMMENTS OF AT&T CORP.

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SUMMARY

1. Interaction Between Sections 222 and 272

The comments of the parties generally support AT&T's position that the nondiscrimination provision of section 272(c)(1) establishes that the BOCs may not provide CPNI to their section 272 affiliates or use that CPNI for the benefit of those affiliates unless they release CPNI to all other entities on the same terms and conditions -- or unless the section 272 affiliate obtains the CPNI in the same way an unaffiliated third party would, by obtaining the customer's affirmative written consent. Moreover, both the nondiscrimination and structural separation requirements of section 272 require that the BOCs treat their 272 affiliates as third parties for the purpose of CPNI disclosure. This same nondiscrimination obligation requires that the BOCs, to the extent they solicit approvals for disclosure of CPNI to their affiliates, also do so on a nondiscriminatory basis for all other entities.

The RBOCs' claims that section 272(g)(3), which exempts certain joint marketing activities from the ambit of section 272(c)(1), permits discriminatory disclosure or use of CPNI stretch section 272(g)(3) beyond recognition. BOC marketing of its section 272 affiliate's services, and that affiliate's marketing of BOC services, do not require access to or use of CPNI. Marketing campaigns can be and are created and executed without use of such information.

Finally, the RBOCs' claims that the First Amendment prevents the application of a nondiscrimination requirement to BOC solicitation of approvals to disclose CPNI incorrectly relies on a

standard that applies only to viewpoint-based restrictions. To the contrary, a nondiscrimination requirement would be content neutral and would further the undeniably substantial governmental interest in preventing BOC discrimination. Thus, the First Amendment does not constrain the Commission's ability to adopt the rules AT&T proposed in its March 17, 1997 comments.

2. Interaction Between Sections 222 and 274

Similarly to section 272, section 274 requires the BOCs to deal with electronic publishing affiliates or joint ventures on a nondiscriminatory basis. Section 274 further requires that any teaming or business arrangement that a BOC enters be nondiscriminatory. As a result, BOCs are required to provide to all electronic publishing entities any CPNI, on the same terms and conditions, as the BOCs provide CPNI to, or use CPNI on behalf of, their electronic publishing affiliates, joint ventures or teaming partners. The best balance for the interest of privacy, competition and the BOC's nondiscrimination duties is to require that those BOC-related entities be treated as third parties and that those entities be required to solicit written approvals for CPNI disclosure for their own use.

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Pursuant to the Commission's Public Notice seeking further comment, DA 97-385, released on February 20, 1997, and Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") replies to other parties' comments¹ on the specific questions outlined in the Notice concerning the implementation of section 702 of the Telecommunications Act of 1996² (which adds a new section 222 to the Communications Act of 1934) regarding the use and protection of customer proprietary network information ("CPNI"). In particular, the Notice sought comments on a series of questions addressing (1) the relationship between section 222 and section 272 of the Act, and (2) the relationship between section 222 and section 274.

¹ A list of commenters and the abbreviations used to identify them is attached as Appendix A.

² Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151, et seq. ("1996 Act").

I. Interplay Between Section 222 and Section 272

A. Using, Disclosing, and Permitting Access to CPNI

1. Does the requirement in section 272(c)(1) that a BOC may not discriminate between its section 272 "affiliate and any other entity in the provision or procurement of...services...and information..." mean that a BOC may use, disclose, or permit access to CPNI for or on behalf of that affiliate only if the CPNI is made available to all other entities? If not, what obligation does the nondiscrimination requirement of section 272(c)(1) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

The Commission has held that the term "information" in section 272(c)(1) includes CPNI. Non-Accounting Safeguards Order ¶ 222.³ Therefore, as AT&T demonstrated in its opening comments, a BOC must provide CPNI to all other entities on the same terms and conditions, including "approval" terms, on which it provides CPNI to its section 272 affiliate. The statute permits no less. § 272(c)(1) ("a Bell operating company may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards"). Except for the RBOCs, the other commenters in this proceeding agree.⁴

The RBOCs contend that, notwithstanding section 272(c)(1)'s express reference to "information," section 272 does not apply to CPNI at all because section 222 is a "specific" provision relating to CPNI, section 272 is "more general," and the

³ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC No. 96-489 (released Dec. 24, 1996) ("Non-Accounting Safeguards Order").

⁴ See TRA, pp. 3-4; ALLTEL, p. 2; Sprint, p. 1; WorldCom, pp. 4-5; MCI, p. 11; AirTouch, pp. 2-4; Cox, pp. 2-3; Directory Dividends, pp. 1-2.

specific trumps the general. The RBOCs therefore contend that they are permitted under section 222 to transfer CPNI to their long-distance affiliates as long as they follow the requirements of section 222 and without regard to section 272.⁵ The RBOCs also contend that section 272(g)'s authorization of joint marketing activities takes the use of CPNI outside the nondiscrimination requirement of section 272(c)(1).⁶ These claims are meritless.

As the Commission has recognized, Congress adopted section 272 "to prohibit anticompetitive discrimination and cost-shifting" that could be possible even after the BOCs have received permission to enter the interLATA marketplace under section 271. Non-Accounting Safeguards Order ¶ 9. Due to their historical position as the monopoly providers of local exchange service for most of the country (see id. ¶ 10), section 272 imposes on the BOCs restrictions that are not applicable to other telecommunications carriers. The core of section 272 is the requirement that the BOCs must treat their long-distance affiliates in all regards -- including the "provision of information" -- in precisely the same manner as they treat unaffiliated long-distance companies. Thus, in this regard, if either section is "more specific," it is section 272, for it is section 272 that deals with regulation of the BOCs.

In all events, the Commission has already rejected the RBOCs' claims by finding that section 272(c)(1) applies to CPNI.

⁵ Ameritech, pp. 4-11; SBC, p. 4; BA/NYNEX, p. A-2; BellSouth, p. 4.

⁶ SBC, pp. 3-4; U S WEST, pp. 9-10; BellSouth, pp. 11-12; Pacific, p. 8.

BOCs therefore may not "use, disclose, or permit access to CPNI for or on behalf of" their section 272 affiliates unless they make such CPNI available to all other entities or their section 272 affiliates obtain written authorization on their own. As AT&T noted in its opening comments (pp. 6-7), the reasonable accommodation of sections 222 and 272 is for the Commission to require that a BOC and its 272 affiliate employ those procedures appropriate for an unaffiliated third party to gain access to CPNI.

AT&T addresses the RBOCs' arguments concerning section 272(g) in response to Question 7.

2. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), does the nondiscrimination requirement of section 272(c)(1) mandate that a BOC's section 272 affiliate be treated as a third party for which the BOC must have a customer's affirmative written request before disclosing CPNI to that affiliate?

Again, commenters other than the RBOCs overwhelmingly agree with AT&T that the BOCs are required to treat their 272 affiliates as "third parties" with respect to the disclosure of CPNI.⁷ The RBOCs, of course, advance a variety of arguments to the contrary. SBC makes the most aggressive claim in this regard, arguing that "Section 272 is not helpful in defining the Commission's term 'third party,' and in fact is irrelevant to the application of Section 222."⁸ This view of course is completely at odds with the Commission's previous finding that section

⁷ See TRA, pp. 5-6; Sprint, pp. 2-3 & n.1; WorldCom, p. 6; MCI, pp. 15-16; Cox, pp. 3-4; Directory Dividends, p. 6.

⁸ SBC, p. 7.

271(c)(1)'s nondiscrimination provision -- which requires a BOC not to discriminate in favor of its 272 affiliate in the provision of "information" -- applies to the provision of CPNI. Non-Accounting Safeguards Order ¶ 222.

Further, SBC's view is simply blind to the separation requirements of section 272. Section 272(a)(1)(A) requires that the section 272 affiliate be "separate from any operating company entity"; section 272(b)(1) requires that it "operate independently" from the BOC; and sections 272(c)(1) and 272(e) prohibit any BOC discrimination between its section 272 affiliate and any other party. See AT&T, pp. 7-8. It is inescapable, therefore, that the BOC must treat its section 272 affiliate as an unaffiliated "third party" for purposes of disclosing or using CPNI.

Other RBOCs contend that section 272(c)(1) should not be read literally to require nondiscrimination with regard to CPNI because customer privacy expectations are different with respect to affiliates than with respect to nonaffiliates and the public expects to receive, from carriers with which they have established relationships, marketing information concerning those carriers' other services.⁹ Although AT&T in general agrees that consumers expect to receive information concerning other basic telecommunications services, from a carrier with which they have chosen to establish a relationship,¹⁰ that is of no assistance to the RBOCs here. First, the BOCs have formed customer relationships

⁹ See Ameritech, p. 9; U S WEST, p. 15; BellSouth, p. 14.

¹⁰ AT&T, pp. 2-3.

based solely on their historical position as the monopoly providers of local service. Consumers did not voluntarily form relationships with the BOCs, as they do today with interexchange carriers and other competitive carriers, and no expectation of broad use of their CPNI within the BOC companies for competitive services can be inferred from customers' compelled subscription to the BOCs' local service. Moreover, while carriers in competitive markets have strong incentives to protect CPNI in accord with the expectations of their customers, who can change carriers if their existing carrier fails to meet those expectations, BOC monopolies have historically faced no comparable incentives and constraints.

Second, and more importantly, such consumer expectations are in any event irrelevant to what section 272 requires. Those independence and nondiscrimination requirements are intended to prevent BOC anticompetitive conduct. Congress's decision in section 272 to establish requirements applicable only to the BOCs, and not to other carriers, cannot be ignored in favor of claimed customer expectations.

Finally, Pacific and U S WEST contend that the section 272(c)(1) nondiscrimination requirement can be met by employing a principle that a BOC is required to disclose CPNI to all "authorized" entities, but that the "authorization" can be different depending upon whether the entity is a BOC affiliate or an unaffiliated entity. Pacific, p. 9; see also U S WEST, pp. 10, 13. This is a semantic game. Section 271(c)(1) requires nondiscrimination in the "provision of information" as between the BOC affiliate and other entities. If the BOC "provides" CPNI to

its affiliate on the basis of oral permission or negative opt-out, it must provide that information on the same basis to all other entities.¹¹

AT&T addresses the RBOCs' 272(g) arguments in Question 7.

3. If a telecommunications carrier may disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request" under section 222(c)(2), must carriers, including interexchange carriers and independent local exchange carriers (LECs), treat their affiliates and other intra-company operating units (such as those that originate interexchange telecommunications services in areas where the carriers provide telephone exchange service and exchange access) as third parties for which customers' affirmative written requests must be secured before CPNI can be disclosed? Must the answer to this question be the same as the answer to question 2?

As AT&T has consistently urged throughout this proceeding, section 222(c) allows a carrier to use CPNI based on "non-affirmative" "non-written" approval and there is no requirement in section 222 that carriers must secure written approval to disclose such information to their other business units or affiliates.¹² Moreover, although the BOCs are subject to nondiscrimination and structural separation requirements under sections 272 and 274, no provision of the 1996 Act places such requirements on interexchange carriers or other competitive carriers and requires them to treat their business units and affiliates as unaffiliated entities.

¹¹ BellSouth (p. 14) suggests that it may use more lenient approval standards with its affiliates than those it imposes on unaffiliated third parties because BellSouth can trust its affiliate with regard to its securing customer approval. That is simply the discrimination section 272(c)(1) was intended to prevent.

¹² See AT&T, p. 8 & n.9; accord SBC, p. 8; U S WEST, p. 16.

Only MCI and TRA disagree with AT&T's position.¹³ MCI contends (p. 17) that section 222(c)'s approval requirements must be applied on an "intracompany basis as well as between different entities." But, as AT&T has shown in this proceeding, the best interpretation of section 222(c)(1) permits the use of CPNI for all telecommunications services without any approval.¹⁴

B. Customer Approval

4. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must a BOC disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with its section 272 affiliate? If, for example, a BOC may disclose CPNI to its section 272 affiliate pursuant to a customer's oral approval or a customer's failure to request non-disclosure after receiving notice of an intent to disclose (i.e., opt-out approval), is the BOC required to disclose CPNI to unaffiliated entities upon the customer's approval pursuant to the same method?

The parties have treated this question as almost identical to Question 1, and the commenters have similarly split, with AT&T¹⁵ and all other commenters¹⁶ except the RBOCs¹⁷ agreeing that BOC disclosure of CPNI to a section 272 affiliate, based on any approval

¹³ Compare MCI, pp. 16-17 and TRA, p. 7 with ALLTEL, p. 4; Sprint, pp. 4-5; WorldCom, pp. 6-7; Ameritech, pp. 6-7, 9; SBC, pp. 7-8; U S WEST, p. 16; BellSouth, p. 16; Pacific, pp. 9-10; BA/NYNEX, p. A-3; SNET, pp. 3-4; CBT, pp. 2-4; USTA, p. 2; NTCA/OPASTCO, pp. 2-3; Cox, p. 4.

¹⁴ See AT&T, pp. 2-3.

¹⁵ AT&T, p. 10.

¹⁶ TRA, p. 8; ALLTEL, p. 5; Sprint, p. 6; WorldCom, pp. 7-8; Cox, p. 5.

¹⁷ Ameritech, pp. 6-7, 9; SBC, p. 8; U S WEST, p. 16; BellSouth, p. 17; Pacific, p. 10.

short of a written authorization solicited and received by the section 272 affiliate, requires that the BOC make the CPNI available to all other entities based on similar approval. See Questions 1 and 2.

5. If sections 222(c)(1) and 222(c)(2) require customer approval, but not an affirmative written request, before a carrier may use, disclose, or permit access to CPNI, must each carrier, including interexchange carriers and independent LECs, disclose CPNI to unaffiliated entities under the same standard for customer approval as is permitted in connection with their affiliates and other intra-company operating units?

As with Question 3, virtually all commenters squarely agree that no provision of the Communications Act requires interexchange carriers and other non-ILECs to disclose CPNI on a nondiscriminatory basis, once the interexchange carriers and other non-ILECs have secured whatever level of approval the Commission ultimately determines is necessary.¹⁸ MCI, however, seems to imply that interexchange carriers and other competitive carriers might have some duty under sections 201(b) and 202(a) nondiscriminatorily to disclose to unaffiliated entities CPNI if those competitive carriers receive approval and use or disclose CPNI on an intracorporate basis or selectively to nonaffiliates. MCI, p. 19. That position is groundless. Sections 201(b) and 202(a) require carriers not to discriminate between similarly situated third parties to whom they provide service.¹⁹ They do not require

¹⁸ AT&T, p. 10; TRA, p. 9; ALLTEL, p. 5; WorldCom, p. 9; Ameritech, pp. 6-7, 9; SBC, p. 9; U S WEST, p. 18; BellSouth, p. 18; Pacific, p. 11; BA/NYNEX, pp. A-3 to A-4; SNET, pp. 4-6; CBT, p. 5; USTA, p. 3; NTCA/OPASTCO, p. 3.

¹⁹ See generally Competitive Telecommunications Association v. FCC,
(continued...)

competitive carriers to treat their affiliates or intra-company units as third parties.

6. Must a BOC that solicits customer approval, whether oral, written, or opt-out, on behalf of its section 272 affiliate also offer to solicit that approval on behalf of unaffiliated entities? That is, must the BOC offer an "approval solicitation service" to unaffiliated entities, when it provides such a service for its section 272 affiliate? If so, what specific steps, if any, must a BOC take to ensure that any solicitation it makes to obtain customer approval does not favor its section 272 affiliate over unaffiliated entities? If the customer approves disclosure to both the BOC's section 272 affiliate and unaffiliated entities, must a BOC provide the customer's CPNI to the unaffiliated entities on the same rates, terms, and conditions (including service intervals) as it provides the CPNI to its section 272 affiliate?

Commenters other than the RBOCs agree that BOCs that solicit customer approvals on behalf of their 272 affiliates must provide such a service, on a nondiscriminatory basis, to unaffiliated entities.²⁰ The RBOCs argue that the solicitation of approvals is not a service that the BOC would be "providing" its affiliate and therefore would not fall within section 272(c)(1)'s nondiscrimination requirement.²¹ Alternatively, the RBOCs argue that the First Amendment prohibits rules that would require it to make solicitations on behalf of others.²²

The essence of the RBOCs' first argument seems to be that solicitation of customer approvals is merely a service the BOC provides to its own customer -- i.e., giving the customer the

¹⁹ (...continued)
998 F.2d 1058 (D.C. Cir. 1993).

²⁰ TRA, p. 11; ALLTEL, p. 6; Sprint, pp. 8-9; WorldCom, pp. 10-11; Cox, p. 6.

²¹ SBC, pp. 10-11; U S WEST, p. 18; BellSouth, p. 19.

²² U S WEST, p. 19; BellSouth, p. 19; Pacific, pp. 12-13.

ability to receive information concerning other services (as the BOC sees fit).²³ But, where the BOC solicits an approval from one of its customers that runs only in favor of the BOC's section 272 affiliate, it is impossible to see how that solicitation is not both a service for the BOC's affiliate and a service that provides information and other benefits to that affiliate. As a result, and in accord with the Commission's finding that section 272(c)'s nondiscrimination requirement must be strictly construed,²⁴ if the BOC solicits approvals, it must do so on behalf of all other entities.²⁵

The RBOCs' second contention -- that the First Amendment prohibits the Commission from requiring the BOCs to solicit approvals on a nondiscriminatory basis -- is also without basis. If true, the RBOCs' proposition that they cannot be "forced" to make statements on behalf of other entities would have invalidated the equal access rules of the MFJ (and now section 251(g) of the 1996 Act) under which the BOCs were required to identify long-distance providers to local customers. Moreover, the cases on which the RBOCs rely do not support their conclusion. Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986) (plurality), turned most critically on the viewpoint discrimination of the public utility

²³ See U S WEST, p. 18; BellSouth, p. 19.

²⁴ Non-Accounting Safeguards Order ¶ 197 (requirement is "unqualified").

²⁵ As AT&T noted (pp. 12-13), the only nondiscriminatory means by which this may practically be done is an "all-or-nothing" approach -- i.e., the BOC must solicit approval to disclose the customer CPNI to any other entity. Accord WorldCom, pp. 10-11.

commission's order there, under which an organization with opinions precisely opposite to that of the utility was given access to the utility's billing envelopes for the principal reason that it did have differing views. See id. at 12 ("The order does not simply award access to the public at large; rather, it discriminates on the basis of the viewpoints of the selected speakers"); id. at 13 ("[s]uch one-sidedness impermissibly burdens appellant's own expression"). Here, a requirement that BOCs nondiscriminatorily solicit approvals to disclose CPNI does not contain any viewpoint discrimination. It similarly does not, in fact, involve any of the quasi-political speech that was at the heart of Pacific Gas. Id.²⁶

Moreover, even if the rubric of Pacific Gas applies,²⁷ a nondiscrimination requirement would be "a narrowly tailored means" of serving Congress's stated purpose in section 272 of preventing discrimination by the BOCs -- which is surely a "compelling state interest." Compare Pacific Gas, 475 U.S. at 19. In fact, the Court in Pacific Gas specifically suggested that a "content neutral" regulation designed to "mak[e] a variety of views available" would pass muster. Id. at 20.

²⁶ Riley v. National Fed'n of the Blind, 487 U.S. 781, 796 (1988), quoted by BellSouth (p. 19), also was not a commercial speech case: "we do not believe that the speech [here] retains its commercial character when it is inextricably intertwined with otherwise fully protected speech." Neither was Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 115 S. Ct. 2338 (1995); see BellSouth, p. 20.

²⁷ In general, commercial speech may be regulated if the "restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." Ibanez v. Florida Dep't of Business, 114 S. Ct. 2084, 2088 (1994).

C. Other Issues

7. If, under sections 222(c)(1), 222(c)(2), and 272(c)(1), a BOC must not discriminate between its section 272 affiliate and non-affiliates with regard to the use, disclosure, or the permission of access to CPNI, what is the meaning of section 272(g)(3), which exempts the activities described in sections 272(g)(1) and 272(g)(2) from the nondiscrimination obligations of section 272(c)(1)? What specific obligations with respect to the use, disclosure, and permission of access to CPNI do sections 222(c)(1) and 222(c)(2) impose on a BOC that is engaged in the activities described in sections 272(g)(1) and 272(g)(2)?

Section 272(g)(3) gives the BOCs, once they are granted interLATA authority, the freedom to market and sell the services of their section 272 affiliates without similarly marketing and selling the services of unaffiliated interexchange carriers. As AT&T stated in its March 17, 1997 comments (pp. 13-14), that is the extent of the exception to section 272(c)(1)'s nondiscrimination requirement. The RBOCs, however, take the position that section 272(g) not only permits selling and marketing, but also exempts their CPNI disclosures to or use on behalf of their 272 affiliates from section 272(c)(1)'s nondiscrimination requirement so long as the CPNI disclosure is somehow "related to" a joint marketing activity.²⁸ The RBOCs attempt to create the impression that the authorization of joint marketing would otherwise be meaningless, because marketing cannot be conducted without CPNI. That is surely wrong, as AT&T and others demonstrated in the opening comments.²⁹

Thus, the RBOCs are ultimately reduced to claiming that CPNI is merely important to "quality" marketing and product

²⁸ Ameritech, pp. 4-8; SBC, p. 12; U S WEST, p. 21; BellSouth, pp. 20-21; Pacific, p. 14; BA/NYNEX, pp. A-4 to A-5.

²⁹ See AT&T, p. 14; TRA, p. 13; Sprint, p. 12; WorldCom, pp. 12-14; AirTouch, p. 6.

development and that section 272(g) permits to the BOCs all marketing activities permitted interexchange carriers and other competitive carriers.³⁰ The argument places on section 272(g) weight that it will not bear. As the Commission has previously found, section 272(g) does not include all activities that would be useful to marketing or otherwise incident thereto, such as joint planning and design of offerings. See Non-Accounting Safeguards Order ¶ 296 ("BOC participation in the planning, design, and development of a section 272 affiliate's offerings" is not within section 272(g)). Moreover, section 272 is intended to limit the BOCs' activities on behalf of section 272 affiliates because of the risk of anticompetitive activities. Section 272(g) was necessary to permit joint marketing, which previously was forbidden by the AT&T consent decree.³¹ It does not go further to permit the discriminatory provision of information, service or facilities (compare section 271(c)(1)) simply because they might be incidental to joint marketing activities.

8. To what extent is soliciting customer approval to use, disclose, or permit access to CPNI an activity described in section 272(g)? To the extent that a party claims that CPNI is essential for a BOC or section 272 affiliate to engage in any of the activities described in section 272(g), please describe in detail the basis for that position. To the extent that a party claims that CPNI is not essential for a BOC or section 272 affiliate to engage

³⁰ E.g., SBC, p. 4 ("CPNI ... support[s] joint marketing"); U S WEST, p. 22 ("CPNI clearly is essential with respect to ... quality product planning and marketing"); Pacific, p. 15 ("Marketing and selling are activities for which access to information about a customer's existing services is very helpful").

³¹ See, e.g., United States v. Western Elec. Co., No. 82-0192, slip op. at 3 & n.4 (D.D.C. April 11, 1985).

in those activities, please describe in detail the basis for that position.

Soliciting approvals to disclose CPNI is not an activity exempted from section 272's nondiscrimination requirements. The solicitation of approvals is not "marketing" or "selling" and the joint marketing excepted by section 272(g)(3) may proceed without the use of CPNI, as AT&T and others demonstrated.³² The RBOCs for the most part recycle their arguments that CPNI can be related to joint marketing and therefore must fall within section 272(g)(3). See Question 7.

SBC and U S WEST, however, additionally contend that BOC communication with its customers to solicit such approvals is not the provision of information to a section 272 affiliate, and that the answer to this question does not therefore depend on the scope of section 272(g)(3).³³ AT&T has responded to this contention in Question 6. Nevertheless, it is worthy of note that SBC concedes (p. 12) that "solicitation is not an activity under Section 272(g)."

In fact, it appears that the RBOCs have already begun discriminatorily soliciting approvals from their customers to use CPNI, including for their future long-distance services, in violation of section 272(c)(1). As the attached document shows, Bell Atlantic has been making solicitations for permission to provide CPNI to its long-distance and other affiliates. There is no indication that unaffiliated entities have nondiscriminatory

³² AT&T, pp. 15-16; TRA, p. 14; Sprint, p. 13; WorldCom, pp. 14-15; Cox, p. 8.

³³ SBC, p. 12; U S WEST, p. 22.

opportunities to gain access to this information. More immediately, to the extent that solicitation is a "marketing activity," as Bell Atlantic/NYNEX contend (p. A-5), this solicitation violates sections 271 and 272 as unauthorized in-region interLATA activity.³⁴

9. Does the phrase "information concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI as defined in section 222(f)(1)? Does the phrase "services...concerning [a BOC's] provision of exchange access" in section 272(e)(2) include CPNI-related approval solicitation services? If such information or services are included, what must a BOC do to comply with the requirement in section 272(e)(2) that a BOC "shall not provide any...services...or information concerning its provision of exchange access to [its affiliate] unless such ... services ... or information are made available to other providers of interLATA services in that market on the same terms and conditions"?

The CPNI information within the BOCs' control includes much information derived from their customers' use of toll services, both on an inbound and outbound basis. This is because, as the Commission has recognized, the BOCs have historically provided all exchange access, including both switched and special access ordered by customers through interexchange carriers and others. Compare Non-Accounting Safeguards Order ¶ 10. This CPNI therefore is "information concerning ... exchange access" within the meaning of section 272(e)(2) and subject to that section's nondiscrimination requirement. All of the commenters except five of the RBOCs agree.³⁵

³⁴ Section 272(g)(2) states that "[a] Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d)." Bell Atlantic has received no such authorization.

³⁵ See AT&T, p. 16; TRA, p. 15; ALLTEL, pp. 7-8; Sprint, p. 14; WorldCom, pp. 16-17; Cox, p. 9. But see Ameritech, pp. 11-12; U S WEST, p. 23; SBC, p. 14; BellSouth, p. 23; Pacific, pp. 16-17.

The RBOCs' attempt to restrict 272(e)(2) information to "proprietary information" concerning network design creates a limit not in the statute and would create the opportunity for BOC exploitation of its position as the incumbent, monopolist local exchange provider.

10. Does a BOC's seeking of customer approval to use, disclose, or permit access to CPNI for or on behalf of its section 272 affiliate constitute a "transaction" under section 272(b)(5)? If so, what steps, if any, must a BOC and its section 272 affiliate take to comply with the requirements of section 272(b)(5) for purposes of CPNI?

Two of the commenting RBOCs agree with AT&T that a BOC's solicitation of approvals to disclose CPNI for or on behalf of a 272 affiliate would constitute a transaction pursuant to section 272(b)(5) and would therefore be required to comply with the filing and other requirements attendant thereto.³⁶ The other RBOCs suggest that such a solicitation is only a transaction between the BOC and its own customers, and not with its 272 affiliate.³⁷ But, as AT&T has noted, the Accounting Safeguards Order (§§ 122, 182) makes clear that all assets and services transferred by the BOC to its section 272 affiliate constitute "transactions with" that affiliate. If a BOC solicits approvals that are specific to its affiliate, it creates an intangible (and, as the RBOCs themselves contend, valuable) asset useful only to the section 272 affiliate. These are services provided for, and that benefit, only the 272 affiliate. Their provision must, if 272(b)(5) is to be fully enforceable, be

³⁶ See Ameritech attachment, p. 4; Pacific, p. 17. See also AT&T, p. 17; TRA, p. 16; Sprint, p. 16; WorldCom, pp. 18-19.

³⁷ SBC, p. 15; U S WEST, p. 23; BellSouth, p. 23; BA/NYNEX, p. A-6.

considered a transaction subject to accounting and disclosure requirements. See also Question 6.

* * *

AT&T therefore urges the Commission to adopt the rules that AT&T proposed in its March 17, 1997 comments in response to Question 12, to reflect the interplay between sections 222 and 272.

II. Interplay Between Section 222 and Section 274

A. Threshold Issues

13. To what extent, if any, does the term "basic telephone service information," as used in section 274(c)(2)(B) and defined in section 274(i)(3), include information that is classified as CPNI under section 222(f)(1)?

AT&T refers to its response to Question 13 in its March 17, 1997 comments.

B. Using, Disclosing, and Permitting Access to CPNI

(i). Section 274(c)(2)(A) -- Inbound Telemarketing or Referral Services

14. Does section 274(c)(2)(A) mean that a BOC that is providing "inbound telemarketing or referral services related to the provision of electronic publishing" to a separated affiliate, electronic publishing joint venture, or affiliate may use, disclose, or permit access to CPNI in connection with those services only if the CPNI is made available, on nondiscriminatory terms, to all unaffiliated electronic publishers who have requested such services? If not, what obligation does the nondiscrimination requirement of section 274(c)(2)(A) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

In the Electronic Publishing Order (¶¶ 149, 152),³⁸ the Commission held that where a customer on an inbound marketing call requests a referral to an electronic publisher, but does not specify the BOC affiliate, the BOC must identify all such providers in random order. This result is required by section 274(c)(2)(A)'s nondiscrimination requirement.

Moreover, as AT&T previously noted, section 274(c)(2), as well as section 274(b)'s requirements that the BOC affiliate or joint venture operate independently, require that a BOC that solicits verbal consent to utilize a customer's CPNI during an inbound telemarketing call nondiscriminatorily provide that CPNI to any other unaffiliated electronic publisher by posting that information and by restricting immediate access to it by its affiliate.³⁹

In general, the RBOCs contend that section 274(c)(2) only requires a BOC to provide its "services" on a nondiscriminatory basis and does not require the provision of CPNI to entities that do not also engage the service.⁴⁰ But section 274 requires the BOCs to provide services on "nondiscriminatory terms" (§ 274(c)(2)(A)) and permits only "nondiscriminatory ... arrangements" (§ 274(c)(2)(B)). The BOC therefore may not structure its services in such a way that

³⁸ Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, FCC No. 97-35 (released Feb. 7, 1997) ("Electronic Publishing Order").

³⁹ AT&T, p. 21.

⁴⁰ Ameritech, pp. 13-15; SBC, p. 16; U S WEST, p. 25; Pacific, p. 23.

unaffiliated entities are required to purchase services or engage in teaming that they neither need nor desire solely to gain access to the competitively important CPNI which the BOC uniquely holds and which the BOC is providing its affiliate or teaming arrangement.

(ii). Section 274(c)(2)(B) -- Teaming or Business Arrangements

15. To the extent that basic telephone service information is also CPNI, should section 274(c)(2)(B) be construed to mean that a BOC, engaged in an electronic publishing "teaming" or "business arrangement" with "any separated affiliate or any other electronic publisher," may use, disclose, or permit access to basic telephone service information that is CPNI in connection with that teaming or business arrangement only if such CPNI is also made available on a nondiscriminatory basis to other teaming or business arrangements and unaffiliated electronic publishers? If not, what obligation does the nondiscrimination requirement of section 274(c)(2)(B) impose on a BOC with respect to the use, disclosure, or permission of access to CPNI?

As stated in Question 14, section 274(c)(2)(B) only permits the BOCs to engage in "nondiscriminatory teaming or business arrangements." In order for a BOC's teaming or business arrangement to be nondiscriminatory vis-a-vis other entities, the BOC must provide other entities any CPNI that it provides to the teaming or business arrangement. As at least one RBOC acknowledges, this is required by the Electronic Publishing Order (§ 166).⁴¹ Outside the inbound telemarketing context, this requires that the non-BOC entity to the teaming arrangement seek the affirmative written consent of the customer in order to access the BOC's CPNI. AT&T, pp. 22-23. The RBOCs' suggestions that they may "use" CPNI in relation to a teaming arrangement or joint venture without incurring any

⁴¹ BellSouth, p. 27.

disclosure obligations requires a distorted reading of section 274.⁴² BOCs' use of CPNI that is directed toward electronic publishing must be considered part of the "teaming or business arrangement," and therefore must be nondiscriminatory.

16. If section 222(c)(2) permits a BOC to disclose a customer's CPNI to a third party only pursuant to the customer's "affirmative written request," does section 274(c)(2)(B) require that the entities, both affiliated and non-affiliated, engaged in section 274 teaming or business arrangements with the BOC be treated as third parties for which the BOC must have a customer's affirmative written request before disclosing CPNI to such entities?

See AT&T's Responses to Questions 14 and 15; see also Responses to Questions 1, 2, 4 and 6.

(iii). Section 274(c)(2)(C) -- Electronic Publishing Joint Ventures

17. Should section 274(c)(2)(C) be construed to mean that an electronic publishing joint venture be treated as a third party for which the BOC must have a customer's approval, whether oral, written, or opt-out, before disclosing CPNI to that joint venture or to joint venture partners?

See AT&T's Responses to Questions 14, 15 and 16; see also Responses to Questions 1, 2, 4 and 6.

C. Customer Approval

(i). Section 274(c)(2)(A) -- Inbound Telemarketing or Referral Services

18. Must a BOC that is providing inbound telemarketing or referral services to a "separated affiliate, electronic publishing joint venture, affiliate, or unaffiliated electronic publisher" under section 274(c)(2)(A) obtain customer approval pursuant to section 222(c) before using, disclosing, or permitting access to CPNI on behalf of such entities? If so, what forms of customer approval (oral, written, or opt-out) would be necessary to permit a BOC to use a customer's CPNI on behalf of each of these entities in this situation? What impact, if any, does section 222(d)(3) have on

⁴² E.g., SBC, p. 17; BA/NYNEX, p. A-7.